

## 4. Revised Code of Washington (RCW) Chapter 90.42 Revised

### Sections

90.42.005	Policy--Findings.
90.42.010	Findings--Intent.
90.42.020	Definitions.
90.42.030	Contracts to finance water conservation projects--Public benefits--Trust water rights.
90.42.040	Trust water rights program--Water right certificate--Notice of creation or modification.
90.42.050	Guidelines governing trust water rights--Submission of guidelines to joint select committee.
90.42.060	Chapter 43.83B or 43.99E RCW not replaced or amended.
90.42.070	Involuntary impairment of existing water rights not authorized.
90.42.080	Trust water rights--Acquisition, donation, exercise, and transfer--Appropriation required for expenditure of funds.
90.42.090	Jurisdictional authorities not altered.
90.42.900	Severability--1991 c 347.

### **RCW 90.42.005 Policy--Findings.**

(1) It is the policy of the state of Washington to recognize and preserve water rights in accordance with RCW 90.03.010.

(2) The legislature finds that:

(a) The state of Washington is faced with a shortage of water with which to meet existing and future needs, particularly during the summer and fall months and in dry years when the demand is greatest;

(b) Consistent with RCW 90.54.180, conservation and water use efficiency programs, including storage, should be the preferred methods of addressing water uses because they can relieve current critical water situations, provide for presently unmet needs, and assist in meeting future water needs. Presently unmet needs or current needs includes the water required to increase the frequency of occurrence of base or minimum flow levels in streams of the state, the water necessary to satisfy existing water rights, or the water necessary to provide full supplies to existing water systems with current supply deficiencies; and

(c) The interests of the state will be served by developing programs and regional water resource plans, in cooperation with local governments, federally recognized tribal governments, appropriate federal agencies, private citizens, and the various water users and water interests in the state, that increase the overall ability to manage the state's waters in order to resolve conflicts and to better satisfy both present and future needs for water.

[1991 c 347 § 1.]

### **Notes:**

**Purposes--1991 c 347:** "The purposes of this act are to:

(1) Improve the ability of the state to work with the United States, local governments, federally recognized tribal governments, water right holders, water users, and various water interests in water conservation and water use efficiency programs designed to satisfy existing rights, presently unmet needs, and future needs, both instream and out-of-stream;

(2) Establish new incentives, enhance existing incentives, and remove disincentives for efficient water use;

(3) Establish improved means to disseminate information to the public and provide technical assistance regarding ways to improve the efficiency of water use;

(4) Create a trust water rights mechanism for the acquisition of water rights on a voluntary basis to be used to meet presently unmet needs and future needs;

(5) Prohibit the sale of nonconforming plumbing fixtures and require the marking and labeling of fixtures meeting state standards;

(6) Reduce tax disincentives to water conservation, reuse, and improved water use efficiency; and

(7) Add achievement of water conservation as a factor to be considered by water supply utilities in setting water rates." [1991 c 347 § 2.]

### **RCW 90.42.010 Findings--Intent.**

The legislature finds that a need exists to develop and test a means to facilitate the voluntary transfer of water and water rights, including conserved water, to provide water for presently unmet needs and emerging needs. Further, the legislature finds that water conservation activities have the potential of affecting the quantity of return flow waters to which existing water right holders have a right to and rely upon. It is the intent of the legislature that persons holding rights to water, including return flows, not be adversely affected in the implementation of the

provisions of this chapter.

[1998 c 245 § 173. Prior: 1993 sp.s. c 4 § 14; 1993 c 98 § 1; 1991 c 347 § 5.]

**Notes:**

**Findings--Grazing lands--1993 sp.s. c 4:** See RCW 79.01.2951.

**Purposes--1991 c 347:** See note following RCW 90.42.005.

**RCW 90.42.020 Definitions.**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Department" means the department of ecology.

(2) "Net water savings" means the amount of water that is determined to be conserved and usable within a specified stream reach or reaches for other purposes without impairment or detriment to water rights existing at the time that a water conservation project is undertaken, reducing the ability to deliver water, or reducing the supply of water that otherwise would have been available to other existing water uses.

(3) "Trust water right" means any water right acquired by the state under this chapter for management in the state's trust water rights program.

(4) "Pilot planning areas" means the geographic areas designated under RCW 90.54.045(2).

(5) "Water conservation project" means any project or program that achieves physical or operational improvements that provide for increased water use efficiency in existing systems of diversion, conveyance, application, or use of water under water rights existing on July 28, 1991.

[1991 c 347 § 6.]

**Notes:**

**Purposes--1991 c 347:** See note following RCW 90.42.005.

**RCW 90.42.030 Contracts to finance water conservation projects--Public benefits--Trust water rights.**

(1) For purposes of this chapter, the state may enter into contracts to provide moneys to assist in the financing of water conservation projects. In consideration for the financial assistance provided, the state shall obtain public benefits defined in guidelines developed under RCW 90.42.050.

(2) If the public benefits to be obtained require conveyance or modification of a water right, the recipient of funds shall convey to the state the recipient's interest in that part of the water right or claim constituting all or a portion of the resulting net water savings for deposit in the trust water rights program. The amount to be conveyed shall be finitely determined by the parties, in accordance with the guidelines developed under RCW 90.42.050, before the expenditure of state funds. Conveyance may consist of complete transfer, lease contracts, or other legally binding agreements. When negotiating for the acquisition of conserved water or net water savings, or a portion thereof, the state may require evidence of a valid water right.

(3) As part of the contract, the water right holder and the state shall specify the process to determine the amount of water the water right holder would continue to be entitled to once the water conservation project is in place.

(4) The state shall cooperate fully with the United States in the implementation of this chapter. Trust water rights may be acquired through expenditure of funds provided by the United States and shall be treated in the same manner as trust water rights resulting from the expenditure of state funds.

(5) If water is proposed to be acquired by or conveyed to the state as a trust water right by an irrigation district, evidence of the district's authority to represent the water right holders shall be submitted to and for the satisfaction of the department.

(6) The state shall not contract with any person to acquire a water right served by an irrigation district without the approval of the board of directors of the irrigation district. Disapproval by a board shall be factually based on probable adverse effects on the ability of the district to deliver water to other members or on maintenance of the financial integrity of the district.

[1993 c 98 § 2; 1991 c 347 § 7.]

**Notes:**

**Purposes--1991 c 347:** See note following RCW 90.42.005.

**RCW 90.42.040 Trust water rights program--Water right certificate--Notice of creation or modification.**

(1) All trust water rights acquired by the state shall be placed in the state trust water rights program to be managed by the department. Trust water rights acquired by the state shall be held or authorized for use by the

department for instream flows, irrigation, municipal, or other beneficial uses consistent with applicable regional plans for pilot planning areas, or to resolve critical water supply problems. To the extent practicable and subject to legislative appropriation, trust water rights acquired in an area with an approved watershed plan developed under chapter 90.82 RCW shall be consistent with that plan if the plan calls for such acquisition.

(2) The department shall issue a water right certificate in the name of the state of Washington for each permanent trust water right conveyed to the state indicating the reach or reaches of the stream, the quantity, and the use or uses to which it may be applied. A superseding certificate shall be issued that specifies the amount of water the water right holder would continue to be entitled to as a result of the water conservation project. The superseding certificate shall retain the same priority date as the original right. For nonpermanent conveyances, the department shall issue certificates or such other instruments as are necessary to reflect the changes in purpose or place of use or point of diversion or withdrawal.

(3) A trust water right retains the same priority date as the water right from which it originated, but as between them the trust right shall be deemed to be inferior in priority unless otherwise specified by an agreement between the state and the party holding the original right.

(4) Exercise of a trust water right may be authorized only if the department first determines that neither water rights existing at the time the trust water right is established, nor the public interest will be impaired. If impairment becomes apparent during the time a trust water right is being exercised, the department shall cease or modify the use of the trust water right to eliminate the impairment.

(5) Before any trust water right is created or modified, the department shall, at a minimum, require that a notice be published in a newspaper of general circulation published in the county or counties in which the storage, diversion, and use are to be made, and in other newspapers as the department determines is necessary, once a week for two consecutive weeks. At the same time the department shall send a notice containing pertinent information to all appropriate state agencies, potentially affected local governments and federally recognized tribal governments, and other interested parties.

(6) RCW 90.14.140 through 90.14.230 have no applicability to trust water rights held by the department under this chapter or exercised under this section.

(7) RCW 90.03.380 has no applicability to trust water rights acquired by the state through the funding of water conservation projects.

(8) Subsections (4) and (5) of this section do not apply to a trust water right resulting from a donation for instream flows described in RCW 90.42.080(1)(b) or to a trust water right leased under RCW 90.42.080(8) if the period of the lease does not exceed five years. However, the department shall provide the notice described in subsection (5) of this section the first time the trust water right resulting from the donation is exercised.

(9) Where a portion of an existing water right that is acquired or donated to the trust water rights program will assist in achieving established instream flows, the department shall process the change or amendment of the existing right without conducting a review of the extent and validity of the portion of the water right that will remain with the water right holder.

[2002 c 329 § 8; 2001 c 237 § 30; 1993 c 98 § 3; 1991 c 347 § 8.]

NOTES:

**Finding--Intent--Severability--Effective date--2001 c 237:** See notes following RCW 90.82.040.

**Intent--2001 c 237:** See note following RCW 90.66.065.

**Purposes--1991 c 347:** See note following RCW 90.42.005.

**RCW 90.42.050 Guidelines governing trust water rights--Submission of guidelines to joint select committee.**

The department, in cooperation with federally recognized Indian tribes, local governments, state agencies, and other interested parties, shall establish guidelines by July 1, 1992, governing the acquisition, administration, and management of trust water rights. The guidelines shall address at a minimum the following:

(1) Methods for determining the net water savings resulting from water conservation projects or programs carried out in accordance with this chapter, and other factors to be considered in determining the quantity or value of water available for potential designation as a trust water right;

(2) Criteria for determining the portion of net water savings to be conveyed to the state under this chapter;

(3) Criteria for prioritizing water conservation projects;

(4) A description of potential public benefits that will affect consideration for state financial assistance in RCW 90.42.030;

(5) Procedures for providing notification to potentially interested parties;

(6) Criteria for the assignment of uses of trust water rights acquired in areas of the state not addressed in a regional water resource plan or critical area agreement; and

(7) Contracting procedures and other procedures not specifically addressed in this section.

These guidelines shall be submitted to the joint select committee on water resource policy before adoption.

[1991 c 347 § 9.]

**Notes:**

**Purposes--1991 c 347:** See note following RCW 90.42.005.

**RCW 90.42.060 Chapter 43.83B or 43.99E RCW not replaced or amended.**

The policies and purposes of this chapter shall not be construed as replacing or amending the policies or the purposes for which funds available under chapter 43.83B or 43.99E RCW may be used.

[1991 c 347 § 10.]

**Notes:**

**Purposes--1991 c 347:** See notes following RCW 90.42.005.

**RCW 90.42.070 Involuntary impairment of existing water rights not authorized.**

Nothing in this chapter authorizes the involuntary impairment of any existing water rights.

[1991 c 347 § 11.]

**Notes:**

**Purposes--1991 c 347:** See note following RCW 90.42.005.

**RCW 90.42.080 Trust water rights--Acquisition, donation, exercise, and transfer--Appropriation required for expenditure of funds.**

(1)(a) The state may acquire all or portions of existing water rights, by purchase, gift, or other appropriate means other than by condemnation, from any person or entity or combination of persons or entities. Once acquired, such rights are trust water rights. A water right acquired by the state that is expressly conditioned to limit its use to instream purposes shall be administered as a trust water right in compliance with that condition.

(b) If the holder of a right to water from a body of water chooses to donate all or a portion of the person's water right to the trust water system to assist in providing instream flows on a temporary or permanent basis, the department shall accept the donation on such terms as the person may prescribe as long as the donation satisfies the requirements of subsection (4) of this section and the other applicable requirements of this chapter and the terms prescribed are relevant and material to protecting any interest in the water right retained by the donor. Once accepted, such rights are trust water rights within the conditions prescribed by the donor.

(2) The department may enter into leases, contracts, or such other arrangements with other persons or entities as appropriate, to ensure that trust water rights acquired in accordance with this chapter may be exercised to the fullest possible extent.

(3) Trust water rights may be acquired by the state on a temporary or permanent basis.

(4) A water right donated under subsection (1)(b) of this section shall not exceed the extent to which the water right was exercised during the five years before the donation nor may the total of any portion of the water right remaining with the donor plus the donated portion of the water right exceed the extent to which the water right was exercised during the five years before the donation. A water right holder who believes his or her water right has been impaired by a trust water right donated under subsection (1)(b) of this section may request that the department review the impairment claim. If the department determines that exercising the trust water right resulting from the donation or exercising a portion of that trust water right donated under subsection (1)(b) of this section is impairing existing water rights in violation of RCW 90.42.070, the trust water right shall be altered by the department to eliminate the impairment. Any decision of the department to alter or not to alter a trust water right donated under subsection (1)(b) of this section is appealable to the pollution control hearings board under RCW 43.21B.230. A donated water right's status as a trust water right under this subsection is not evidence of the validity or quantity of the water right.

(5) The provisions of RCW 90.03.380 and 90.03.390 do not apply to donations for instream flows described in subsection (1)(b) of this section, but do apply to other transfers of water rights under this section.

(6) No funds may be expended for the purchase of water rights by the state pursuant to this section unless specifically appropriated for this purpose by the legislature.

(7) Any water right conveyed to the trust water right system as a gift that is expressly conditioned to limit its use to instream purposes shall be managed by the department for public purposes to ensure that it qualifies as a gift that is deductible for federal income taxation purposes for the person or entity conveying the water right.

(8) If the department acquires a trust water right by lease, the amount of the trust water right shall not

exceed the extent to which the water right was exercised during the five years before the acquisition was made nor may the total of any portion of the water right remaining with the original water right holder plus the portion of the water right leased by the department exceed the extent to which the water right was exercised during the five years before the acquisition. A water right holder who believes his or her water right has been impaired by a trust water right leased under this subsection may request that the department review the impairment claim. If the department determines that exercising the trust water right resulting from the leasing or exercising of a portion of that trust water right leased under this subsection is impairing existing water rights in violation of RCW 90.42.070, the trust water right shall be altered by the department to eliminate the impairment. Any decision of the department to alter or not to alter a trust water right leased under this subsection is appealable to the pollution control hearings board under RCW 43.21B.230. The department's leasing of a trust water right under this subsection is not evidence of the validity or quantity of the water right.

(9) For a water right donated to or acquired by the trust water rights program on a temporary basis, the full quantity of water diverted or withdrawn to exercise the right before the donation or acquisition shall be placed in the trust water rights program and shall revert to the donor or person from whom it was acquired when the trust period ends.

[2002 c 329 § 9; 2001 c 237 § 31; 1993 c 98 § 4; 1991 c 347 § 12.]

NOTES:

**Finding--Intent--Severability--Effective date--2001 c 237:** See notes following RCW 90.82.040.

**Intent--2001 c 237:** See note following RCW 90.66.065.

**Purposes--1991 c 347:** See note following RCW 90.42.005.

**RCW 90.42.090 Jurisdictional authorities not altered.**

It is the intent of the legislature that jurisdictional authorities that exist in law not be expanded, diminished, or altered in any manner whatsoever by this chapter.

[1991 c 347 § 13.]

**Notes:**

**Purposes--1991 c 347:** See note following RCW 90.42.005.

**RCW 90.42.900 Severability--1991 c 347.**

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1991 c 347 § 30.]